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Construction of Conveyance Made in Exchange for the Grantee's Promise to Support the Grantor

Clarence Cornelius
University of Kentucky

CASE COMMENTS

CONSTRUCTION OF CONVEYANCE MADE IN EXCHANGE FOR THE GRANTEE'S PROMISE TO SUPPORT THE GRANTOR

A conveyed realty to *B* by deed which stated that the major part of the consideration was *B*'s promise to "properly provide all necessaries" for *B* during the remainder of the latter's life. Later *A* and *B* were married and lived together as husband and wife until *A*'s death, a year after the marriage. *A*'s collateral heirs brought an action to cancel the deed. The chancellor canceled it on the ground that there had been a failure of consideration. On cross-appeal *B* contends that the right of rescission was personal to the grantor and did not pass to and vest in *A*'s heirs. The Court of Appeals reversed the ruling of the chancellor and allowed the conveyance to stand. The Court said, however, "where the circumstances and the language of the deed authorize the inference that the consideration . . . was intended by the parties to be a condition subsequent," the heirs "should" obtain relief. *Manning* v. *Street*, 279 Ky. 253, 130 S. W. (2d) 735 (1939).

This case raises the problem—how should a conveyence made in exchange for the grantee's promise to support the grantor be construed, and as a consequence or incident of such construction whether the heirs of the grantor may obtain relief. There are at least three different constructions which have been placed upon grants in consideration of care and maintenance; namely, the promise is merely a covenant, or it is a continuing obligation in the nature of a trust, or it raises by implication a condition subsequent. When there is a breach of such an agreement, relief consistent with one of the preceding interpretations may be granted, or relief may be based on a presumably fraudulent procurement of the conveyance, or equity may cancel the deed for failure of consideration. Each of these remedies will receive further consideration in the paragraphs which follow.

1) When only the words of the instrument are considered, perhaps the most natural construction of the grantee's promise to support the grantor would be that it is a covenant. Accordingly, some courts have held such promises to be covenants; and that the remedy for breach thereof is to ascertain the costs of the support and enforce the judgment as a lien.[1] Should these courts refuse to allow assessment of prospective damages, then the grantor would be compelled to bring an

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[1] Rosek v. Kotzur, 267 S. W. 759 (Tex. Civ. App. 1925). 1 Tiffany, Real Property, (3rd ed.) page 376, footnote 45.

". . . when the consideration is shown in the conveyance not to have been paid, a lien exists for its payment." Webster v. Cadwallader, 133 Ky. 500, 505, 118 S. W. 327, 328 (1909) (in this case the covenant was treated as a lien without a judgment). However, the courts in Kentucky may grant rescission of the contract: Wireman v. Wireman, 259 Ky. 120, 81 S. W. (2d) 908 (1935); Reeder v. Reeder, 89 Ky. 529, 12 S. W. 1063 (1890); or cancel the deed, Watson v. Gilliam, 252 Ky. 762, 68 S. W. (2d) 399 (1934).

indefinite number of suits. Future damages—the cost of support of the grantor for the remainder of his life—are, however, no more indefinite or speculative than are damages in cases involving personal injuries of a permanent character, or in actions for wrongful death. Life expectancy tables may be used in either case. But this apparent difficulty in the ascertainment of damages, as well as rules forbidding recovery of future damages, has given equity jurisdiction because the remedy at law is inadequate.[2] The heirs of the grantor would not ordinarily be permitted to recover for breach of the grantee's promise to support the grantor, since the covenant is for the personal benefit of the grantor.[3]

2) In Rhode Island a cancellation of a deed and an accounting between the parties was decreed on the theory that "a continuing obligation on the part of the grantee, in the nature of a trust" was created by the conveyance.[4] In that case the contract to support was oral. It would seem that written contracts contained in the conveyance might also be construed to create "implied trusts". Relief under this view is based on the theory that failure to support the grantor is a renunciation of the trust.

3) Some courts have held the failure to support the grantor a breach of a condition subsequent although the conveyance merely stated that such obligation is a part of the consideration.[5] The Kentucky court has not removed the strict rules of construction usually applied to conditions subsequent to the extent of reaching that result.[6]

It should be noted that breach of a condition subsequent results in

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[2] Whittaker v. Trammell, 86 Ark. 251, 110 S. W. 1041 (1908); Reeder v. Reeder, 89 Ky. 529, 12 S. W. 1063 (1890); Crim v. Holsberry, 42 W. Va. 667, 26 S. E. 314 (1896).

[3] Little v. Little, 205 N. C. 1, 169 S. E. 799 (1933).

[4] Grant v. Bell, 26 R. I. 288, 58 Atl. 951 (1904). See Tiffany, Real Property (3rd ed.) Sec. 216, and footnote 43.

[5] Blum v. Bush, 86 Mich. 206, 49 N. W. 142 (1891).

"It seems to be the settled rule in this jurisdiction that a grant of lands in consideration of an agreement for the future support of the grantor, in the absence of a stipulation to the contrary creates in the grantee an estate on condition subsequent." Huffman v. Ricketts, 60 Ind. App. 526, 111 N. E. 322, 325 (1916).

"Conveyances like the present, made by aged people in consideration of support and care are deemed to be conveyances made upon condition subsequent and will be set aside by a court of equity upon proof of substantial failure to perform." Young v. Young, 157 Wis. 424, 147 N. W. 361, 362 (1914).

8 R. C. L. 1113, Deeds, section 173.

[6] Manning v. Street, *supra*, held that such promise was not a condition subsequent of which the heirs of the grantor may obtain relief. Dictum in the case suggests that had such stipulation constituted a condition subsequent, then the heirs should have been entitled to relief. The Court of Appeals has, however, found a condition subsequent where the deed provided that on the grantee's failure to provide the agreed support, the grantor should have the right to sell the land for said support—a lien having been retained upon the land for that purpose. Adkins v. Adkins, 171 Ky. 762, 188 S. W. 843 (1916).

a forfeiture when the proper steps are taken by the grantor or his heirs. For that reason the courts have developed an aversion toward them, which is manifested by strict rules of construction.[7] Generally, the words of the deed must clearly show the existence of such condition, and must not admit of any other reasonable interpretation.[8] Notwithstanding the oft repeated assertion that the intention of the grantor is to prevail, the cases show that the desire of the grantor is material only to the extent that it is expressed by, or may be implied from, the language of the instrument.[9]

Implied conditions subsequent are not expressed by unmistakable words of condition; consequently with the strict rules of construction usually being applied to conditions subsequent there are but few instances of "implied conditions subsequent". The most notable instances of an implied condition subsequent are those cases in which the grant is construed to be upon condition subsequent when the consideration for the conveyance is the grantee's promise to support the grantor. Under such circumstances "a condition subsequent arises by clear implication," asserted the Wisconsin court in *Glocke* v. *Glocke*.[10] In cases of this nature a forfeiture is less odious since other remedies are thought to be inadequate. But some courts, notwithstanding the fact that they deem such grants to be on condition subsequent in favor of the grantor, refuse to allow the benefit of this construction to extend to the heirs of the grantor.[11] In the usual situation of a condition broken the heirs of the grantor have a cause of action.[12] The principal

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[7] 1 Tiffany, Real Property (3rd ed.) Sec. 193.
words of the deed must clearly show the existence of such condition,

[8] Bain v. Parker, 77 Ark. 168, 90 S. W. 1000 (1905); Studdard v. Wells, 120 Mo. 25, 25 S. W. 201 (1894); Grantz v. Highland Scenic R. Co., 165 Mo. 211, 65 S. W. 223, 225 (1901).

Examples: Land conveyed "as and for a public street of said city," is not granted on a condition subsequent. Avery v. United States, 104 Fed. 711, 44 C. C. A. 161 (1900). Where full consideration was received, land granted "for a public school house, as the property of the schools of said county, and for no other purpose, in fee," did not create a condition subsequent. Faith v. Bowles, 86 Md. 13, 37 Atl. 711 (1897) (This case reviews a number of cases on conditions subsequent).

[9] "One of the first canons of construction is that the intention of the grantor must be ascertained. But intention is a term of art, signifying the meaning of the writing. . . . As has been said, the intention of the grantor must be found within the 'four corners' of the deed." Antley v. Antley, 132 S. C. 306, 128 S. E. 31, 32 (1925).

". . . the inquiry always is to ascertain what he meant by what he said rather than his reasons for saying it, and his reasons are pertinent only in so far as they explain what he said." Garrott v. McConnell, 201 Ky. 61, 64, 265 S. W. 14, 15 (1923).

[10] 113 Wis. 303, 89 N. W. 118 (1902).

[11] 1 Tiffany, Real Property (3rd ed.) page 379-380.

See Malicki v. Malicki, 189 Minn. 121, 248 N. W. 723 (1933), in which the court said that the alleged breach was of a peculiarly personal obligation obviously beneficial to the grantors alone and not available in kind to their heirs and assigns.

[12] 1 Tiffany, Real Property (3rd ed.) Sec. 208.

case assumes that if there were a condition subsequent, the usual remedies would extend to the heirs of the grantor.[13]

4) Deeds of realty given for support have been canceled upon the theory that neglect of or refusal by the grantee to take care of the grantor raises a presumption that the grantee made the contract without intending to perform it, and consequently that the conveyance was obtained by fraud.[14] Under this theory, since relief is given only when the facts warrant the interference of fraud,[15] the grantor is without remedy when performance becomes impossible through no fault of the grantee.

5) A great many cases have granted relief without stating the theory thereof upon a finding that there has been a failure of consideration.[16] Equity in the exercise of its discretion grants aid and determines the extent thereof.[17] It is unconscionable to allow the grantee to retain the property without making recompense therefor. Where there is only a partial failure of consideration equity might refuse to lend its aid.[18]

The result of the principal case may be justified under either of the views mentioned in this comment. Should we construe the grantee's promise to be a covenant, the heirs would not be entitled to a rescission of the conveyance—the covenant obviously being for the benefit of the grantor as an individual. Even though there was a partial failure of consideration, the heirs did not show they had suffered thereby;[19] and had the grantee fully performed his obligation the heirs would have realized nothing. Under the "implied trust theory" the heirs would not have been beneficiaries. Nor are there sufficient indications that the conveyance was procured by fraud for the court to cancel the instrument on that ground. And had a condition subsequent been inferred from the circumstances and the language of the deed, it would not necessarily have followed that the heirs could have obtained relief,[20] even though there is dictum in the case to that effect. However, the

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[13] 279 Ky. 253, 259, 130 S. W. (2d) 735, 738 (1939).

[14] 1 Tiffany, Real Property (3rd ed.) page 375, and footnote 39 under section 216.

Relief is based on the theory that the grantee's refusal to comply raises a presumption that he did not intend to comply with it in the first instance, making the contract fraudulent in its inception. Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673 (1904).

[15] 1 Tiffany, Real Property (3rd ed.) Sec. 216.

[16] *Ibid.*

"Clearly, if the entire consideration for the conveyance has failed, the chancellor ought to rescind the contract, and put the parties in *statu quo.*" Lane v. Lane, 106 Ky. 530, 532, 50 S. W. 857 (1899).

[17] Maddox v. Maddox, 135 Ky. 403, 122 S. W. 201 (1909); Luster v. Whitlock, 203 Ky. 405, 262 S. W. 572 (1924).

[18] 1 Tiffany, Real Property (3rd ed.) page 377, footnote 47..

[19] "Assuming that the evidence demonstrated a failure of consideration, the right to have a conveyance set aside for that reason is purely personal to the grantor, and that right is not transferred to his heirs or devisees." Haslinger v. Gabel, 344 Ill. 254; 176 N. E. 340, 344 (1931).

[20] *Supra*, footnote 11.

court did not infer a condition subsequent, and their finding is in harmony with the usual rules of construction for conditions subsequent.

CLARENCE CORNELIUS.

CONTRACTS NOT TO COMPETE WITHIN A CERTAIN AREA WITHOUT A PROVISION FOR AN EXPRESS SALE OF GOOD WILL

As a part of the contract by which he sold his hospital in Floyd County to the plaintiffs, the defendant agreed not to own or operate a hospital in that county for ten years. Under the same agreement he assigned to the plaintiffs hospitalization contracts with the county and a labor union, together with his good will. Within two years he erected another hospital in Knott County, three hundred yards from the Floyd County line. Many of the defendant's former patients, residing in Floyd County, began to patronize his new hospital instead of that of the plaintiffs. The latter sought to enjoin the defendant from receiving these former patients on the ground that he was breaching his contract not to compete with the plaintiffs in Floyd County. The lower court enjoined the defendant from receiving the patients covered by the assigned contracts, but refused to enjoin him from receiving any other patients. This decision was reversed upon appeal and the defendant was enjoined from receiving at his hospital, for the remainder of the ten year period, any patients from Floyd County.[1]

By the contract there was an express sale of good will as to the assigned contracts, but mention was not made of a sale of the good will of the hospital. Nevertheless, the sale of a business includes an implied transfer of good will, though there is no stipulation to that effect in the contract.[2] The only effect of this implied sale of good will is to raise an obligation on the part of the seller not to derogate from his grant by directly interfering with the business which he has sold to the purchaser.[3]

However, this obligation does not extend so far as to preclude the transferor from opening up a new business in competition with that of the purchaser. While he could not directly interfere with the business that he has sold to the purchaser by soliciting his old customers, he could indirectly interfere with it by dealing with them when they came to him of their own accord.[4] That was what the defendant did here. Since it was not alleged that the defendant solicited any of his former customers or did anything else that would amount to a direct inter-

[1] Johnson et al. v. Stumb et al., 277 Ky. 301, 126 S. W. (2d) 165 (1938).

[2] Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700 (1909). See Madox v. ———— Fuller, 173 So. 12, 14 (Ala. 1937); 5 Williston on Contracts (Rev. Ed. 1937), sec. 1640.

[3] 5 Williston, Contracts (Rev. Ed. 1937), sec. 1640.

[4] *Ibid.*